Filed 11/26/08 P. v. Lowry CA2/8
Opinion following reconsideration

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. CARL AUBRAY LOWRY, Defendant and Appellant.	B173051 (Los Angeles County Super. Ct. No. BA236684)

APPEAL from a judgment of the Superior Court of Los Angeles County. George Gonzales Lomeli, Judge. Affirmed.

Valerie West, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Jaime L. Fuster, Paul M. Roadarmel, Jr., and Chung L. Mar, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

This case is before us for the third time; this time following our grant of a motion for reconsideration.[1] In our immediately preceding opinion, we concluded that the imposition of the high term did not violate *Cunningham v. California* (2007) 549 U.S. 270 (*Cunningham*) because our erroneous factual conclusion that appellant had violated a promise to return to court for sentencing after being advised that a high term sentence would be the consequence of absconding. (See *People v. Cruz* (1988) 44 Cal.3d 1247.)

CONTENTIONS ON APPEAL

Defendant's contention on appeal in his initial brief was that the upper term sentence imposed by the trial court was based on aggravating facts not determined by the jury beyond a reasonable doubt, or admitted by defendant, in violation of the Sixth Amendment right to a jury trial under *Blakely v. Washington* (2004) 542 U.S. 296. In his supplemental opening brief, appellant adds the argument that "the aggravating factors relied on by the court had nothing to do with the crime charged and procedurally there never was any jury to which these factors could have been submitted, since they occurred after appellant's plea. . . . While it is undisputed that appellant did not appear for sentencing as originally scheduled, the actual reasons for this failure were contested but no evidence was presented by either of the parties."

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[1] Initially, Lowry appealed from judgments entered after his plea of nolo contendre to a charge of possession of a controlled substance (Health & Saf. Code, §11377(a)) and admission of a prior "strike" allegation. On November 14, 2005, we filed our first opinion affirming the judgments in all respects.

Thereafter, appellant filed a petition for writ of certiorari before the United States Supreme Court. The Supreme Court granted Lowry's petition, vacated the judgment of this court, and remanded the matter to us for further consideration in light of *Cunningham*. On October 9, 2007, we recalled the remittitur issued on February 22, 2006, vacated the opinion filed on November 14, 2005 and requested the parties to file supplemental briefs addressing the effect, if any, of *Cunningham*, *People v. Black* (2007) 41 Cal.4th 799 (*Black II*), and *People v. Sandoval* (2007) 41 Cal.4th 825 on appellant's sentence. We affirmed that judgment and issued our opinion on February 28, 2008. We thereafter granted appellant's motion for reconsideration and vacated that opinion.

Respondent contends that Lowry's appeal must be dismissed because: 1) appellant did not obtain a certificate of probable cause to challenge the constitutionality of the sentence imposed; 2) any *Cunningham* error was harmless because a jury "applying the beyond-a-reasonable doubt standard, unquestionably would have found true at least a single aggravating circumstance had it been submitted to the jury;" or 3) beyond a reasonable doubt, on remand, the trial court would again impose and upper term.

FACTS AND PROCEDURAL BACKGROUND

On December 11, 2002, appellant pleaded nolo contendere to a charge of possession of a controlled substance (Health and Saf. Code, § 11377(a)). In addition, Lowry admitted the truth of a prior "strike" allegation. The prosecutor informed appellant that "we are going to have you plead guilty to count 1 today, the possession case; admit the prior strike, and the sentence would be 32 months." The court based the sentence on a low term for the offense, 16 months. Lowry's prior strike would double the 16-month sentence. Pursuant to the plea agreement, the prosecutor dismissed a charge of misdemeanor possession of a smoking device (Health and Saf. Code, § 11364). Lowry agreed to assist the Bureau of Alcohol, Tobacco, and Firearms after posting bail.

In addition, Lowry entered a waiver pursuant to *People v. Cruz, supra,* 44 Cal.3d 1247; the court could subject him to an enhanced sentence for a separate offense without a trial. The prosecutor warned Lowry that a failure to return to court would result in an open plea with "up to six years in state prison." The matter was continued to February 6, 2003 for probation and sentencing hearing. Lowry confirmed that he would appear in court.

On February 6, 2003, appellant appeared in the superior court. At that time, appellant withdrew his previously entered plea and re-entered a plea of guilty to the same charge. The District Attorney stated that the plea was pursuant to a plea agreement and told appellant that "you will have certain terms and conditions of this plea agreement that you are going to have to abide by." Appellant's bail was reduced and the sentencing was put over to March 10, 2003 for probation and sentencing hearing. Appellant as advised

that at the next hearing, the judge would determine what sentence appellant would receive; the range of sentence could be from probation to seven years in state prison [the high term doubled plus one year for the prior.] Appellant was advised that if he did not abide by the terms of the plea agreement "the judge will have the ability to sentence you up to the seven years in state prison, which is the maximum for the charges that you are pleading guilty to today."

After the plea was taken the trial judge told appellant "If you don't appear, you are looking at a maximum of seven years in this case. I can tell you right now if you don't appear, that is what I am going to do."

On March 10, 2003, appellant failed to appear in court, his bail was forfeited and a bench warrant was issued for his arrest. Lowry was eventually located by his bail bond company; he had been arrested in Illinois on April 15, 2003 for various traffic violations and for obstruction of justice. After a second arrest in Illinois, he was eventually extradited to California and appeared in court on January 14, 2004. Upon his return to court, the sentencing judge denied probation and imposed the upper term of 36 months, which was to be doubled due to the prior strike.

At sentencing, the judge stated:

> "Let me say that I am inclined to give him the high term on this matter in view of his egregious behavior. [¶]. . . [¶] And the court then, based on the representations made by the attorneys, and I take it based on their reliance on the defendant's representations, convinced this court to allow him to plea open to this court, and then to have him to leave for purposes of cooperation. He shortly thereafter disappeared and absconded. . . . He was picked up in another jurisdiction who attempted to expedite him, and that didn't work out. And he subsequently picked up a misdemeanor case. . . . The court's indicated in all of the factors, I am inclined to impose the high term three years to be doubled pursuant to 1170.12 (a) through (d). [¶ . . . [¶] I find his behavior of absconding more egregious than anything. *He didn't abide by the agreement.* He was warned by this court and advised by this court at the time of his plea that that behavior would not be tolerated, and as a consequence of that, he would be facing an open plea and an open sentence by this court. [¶]. . . [¶] The defendant is sentenced to six years in state prison. *The court will select the high term of three years based on*

the aggravating factors the court referenced on the record with respect to count 1." (Italics added.)

The minute order prepared for that date states, "The court imposes the upper term due to the following factors in aggravation: [¶] (1) Defendant [appellant] immediately absconded from law enforcement in violation with his agreement to cooperate with them. [¶] (2) Defendant [appellant] remained at large close to one year from this jurisdiction. [¶] (3) Defendant [appellant] was brought before the court as a result of the issuance of a bench warrant. [¶] (4) Defendant [appellant] was arrested and charged with a new case.

Upon receiving his sentence, appellant requested a certificate of probable cause. Appellant claimed that the "sentence exceeded that authorized by the plea agreement and is excessive." The superior court rejected the request.

DISCUSSION

Appellant's contentions are that his sentence exceeded that authorized by the plea agreement and is excessive and further that the sentence violated *Cunningham*. The leading case of *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 (*Apprendi*), instructs that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." The February 6, 2003 minute order and appellant in his March 14, 2008 Petition for Rehearing refers to appellant entering an "open plea."[2] The trial judge sentenced appellant to the high term based on "aggravating factors" arising from appellant's failure to return to court and otherwise abide by the terms of his plea

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[2] However, we do not believe this is an accurate characterization of the plea. This was not a true "open plea." Here, the record reflects a plea agreement whereby appellant agreed to certain conditions and agreed to perform certain obligations in return for the trial judge being given the discretion to sentence appellant to any available sentence from probation to the maximum possible prison sentence. In return for the plea, appellant received reduced bail and the possibility of probation. The original plea bargain on December 11, 2002 offered appellant a minimum sentence of 32 months. For reasons that are not reflected in the record, his first plea of no contest was withdrawn and on February 6 and a new no contest plea was entered.

agreement. Appellant contends that "whether or not he failed to abide by the February 6, 2003 agreement to cooperate with law enforcement and return to court on a specified date had to be proved to a jury or admitted by him if it were to provide the legal basis for imposition of the high term under *Cunningham*."[3] The disposition of appellant's contention therefore turns on whether the factors relied upon by the trial judge to choose the high term were of the variety required by *Cunningham* to be tried to a jury or whether they were allowed to be entrusted to the determination of the trial judge.

We conclude that appellant was not entitled to a jury trial in this case for several reasons. We begin with the California Supreme Court's holding that "imposition of the upper term does not infringe upon the defendant's constitutional right to jury trial so long as one legally sufficient aggravating circumstance has been found to exist by the jury, has been admitted by the defendant, or is justified based upon the defendant's record of prior convictions." (*Black II*, *supra* 41 Cal.4th at p. 816.) Other cases have further clarified this distinction and identified the factors which must necessarily be presented to a jury. Many identified exceptions to the general rule that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt" generally relate to the issue of recidivism. Exceptions include: proof of a prior prison sentence;[4] an issue of recidivism unrelated to an element of the crime;[5] that prior convictions were numerous or of increasing seriousness;[6] probation or parole status;[7] and performance on probation or parole.[8]

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[3] The criteria in the court rule for imposing consecutive sentences are not exclusive, but any additional criteria must be stated on the record by the sentencing judge. (Cal Rules of Court, rules 4.408(a), 4.425(a)(1-3); *People v. Berry* (1981) 117 Cal.App.3d 184.) Appellant is not apparently contesting the propriety of using these factors to support the imposition of the high term.

[4] *Apprendi*, *supra*, 530 U.S at p. 488; *Blakely*, *supra*, 542 U. S. at p. 301.

[5] *People v. McGee* (2006) 38 Cal.4th 682, 706-707; *People v. Thomas* (2001) 91 Cal.App.4th 212, 223; *People v. Velasquez* (2007) 152 Cal.App.4th 1503, 1512.

In this case, the trial judge decided to impose the high term sentence on appellant largely because of the fact that he failed to comply with the conditions of his plea agreement. The use of this fact was appropriate. "The listing of circumstances in aggravation in California Rules of Court, rule 4.421, including the identification of factors relating to the crime, is not exclusive: "The enumeration in these rules of some criteria for the making of discretionary sentencing decisions does not prohibit the application of additional criteria reasonably related to the decision being made." (Cal. Rules of Court, rule 4.408(a). The criteria in the court rule for imposing consecutive sentences is not exclusive, but any additional criteria must be stated on the record by the sentencing judge. (See *People v. Whitten* (1994) 22 Cal.App.4th 1761, 1765-1766.)

"'The scope of information a sentencing court may consider is very broad' [citation] and the factors which the trial court is directed to consider in determining aggravation or mitigation of the crime 'include "practically everything which has a legitimate bearing" on the matter in issue.'" (*People v. Whitten, supra,* 22 Cal.App.4th at p. 1766, *People v. Guevara* (1979) 88 Cal.App.3d 86, 93, *People v. Avalos* (1996) 47 Cal.App.4th 1569, 1583.) We hold that the failure to perform the conditions of a plea agreement is reasonably related to sentencing and is a relevant factor for a court to consider in deciding on an appropriate sentence.

We separately hold that although appellant is entitled to a hearing to establish whether the violation of the plea agreement occurred; he is not entitled to a jury trial on that issue. Avoiding the cost and expense of the trial on the underlying charges is one of the benefits of a plea bargain. The benefit to the defendants will vary but commonly

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6 *People v. Epps* (2001) 25 Cal.4th 19.

7 *People v. Medrano* (2008) 161 Cal.App.4th 1514, 1521; *U. S. v. Fagans* (2005) 406 F.3d 138, 141-142.

8 *People v. Yim* (2007) 152 Cal App 4th 366.

include the imposition of a lesser sentence that would result after a conviction. As one of the principal purposes of a plea bargain is to avoid a trial, it is illogical to mandate a jury trial on whether the plea bargain itself was violated.

Analytically and practically, a violation of a plea agreement is similar to a probation violation. In the situation of an alleged violation of a plea agreement, a defendant should be afforded rights similar to those required for an alleged probation violation. There is no right to a jury trial for a probation violation and for both instances, the violation is required to be proven by a preponderance of the evidence. (*People v. Vickers* (1972) 8 Cal.3d 451; *People v. Rodriguez* (1990) 51 Cal.3d 437, 443; *People v. Carr* (2006) 143 Cal.App.4th 786, 792.) The record in this case contains uncontradicted evidence that appellant failed to return for sentencing and only returned to court as a result of his arrest on a misdemeanor matter in Illinois and the bench warrant issued in this case. The conclusion that he did not perform the remaining obligations of his plea agreement is easily reached from those foregoing facts.

We further hold that this plea agreement did not expressly require a jury trial on the violation of the plea conditions and that appellant waived his right to a jury trial on this issue. Courts interpret the terms of a plea agreement under fundamental contract principles. (*People v. Armendariz* (1993) 16 Cal.App.4th 906, 911; *People v. Haney* (1989) 207 Cal.App.3d 1034, 1037; *Leo v. Superior Court* (1986) 179 Cal.App.3d 274, 283.) "[T]he scope of the waiver is approached like a question of contract interpretation -- to what did the parties expressly or by reasonable implication agree?" (*In re Uriah R.* (1999) 70 Cal.App.4th 1152, 1157.) "'The court should accord an interpretation which is reasonable (Civ.Code, § 1643) and which gives effect to the intent of the parties as it may be interpreted from their entire agreement . . . .'" (*People v. Haney, supra,* 207 Cal.App.3d at p. 1039.) Using the paradigm of contract law, "courts should look first to the specific language of the agreement to ascertain the expressed intent of the parties. [Citations.] Beyond that, the courts should seek to carry out the parties' reasonable expectations." (*People v. Nguyen* (1993) 13 Cal.App.4th 114, 120, fn. omitted.)

In *Blakely*, the court said the following: "When a defendant pleads guilty, the State is free to seek judicial sentence enhancements so long as the defendant either stipulates to the relevant facts or consents to judicial factfinding. See *Apprendi* [*supra*,] 530 U.S. at [p.] 488; *Duncan v. Louisiana* [(1968)] 391 U.S. 145, 158. If appropriate waivers are procured, States may continue to offer judicial factfinding as a matter of course to all defendants who plead guilty." (*Blakely, supra,* 542 U.S. at p. 310.) When a defendant enters a plea in exchange for specified benefits, such as dismissal of other counts or a particular punishment, both the defendant and the State must abide by the bargain, and the punishment imposed by the court "may not significantly exceed that which the parties agreed upon." (*People v. Walker* (1991) 54 Cal.3d 1013, 1024; see also *People v. Olea* (1997) 59 Cal.App.4th 1289, 1296.) "A negotiated plea agreement is a form of contract, and it is interpreted according to general contract principles." (*People v. Shelton* (2006) 37 Cal.4th 759, 767 (*Shelton*).)

In a related context, in *Shelton*, the California Supreme Court explained: "[T]he specification of a maximum sentence or lid in a plea agreement normally implies a mutual understanding of the defendant and the prosecutor that the specified maximum term is one that the trial court may lawfully impose . . . ." (*Shelton, supra*, 37 Cal.4th at p. 768.) Likewise, a plea agreement containing a stipulated sentence implies an understanding that the trial court has authority to impose that sentence. "The rationale behind this policy is that defendants who have received the benefit of their bargain should not be allowed to trifle with the courts by attempting to better the bargain through the appellate process." (*People v. Hester* (2000) 22 Cal.4th 290, 295.)

Here the downside of a violation of the plea agreement was made very clear to appellant at the time of the plea. In return for his cooperation and compliance with the terms of the plea agreement, the trial judge would be given the discretion to impose any identified sentence on appellant. It was not a part of the bargain, that in the event that he failed to live up to his end of the bargain, the court would have to assemble a jury and prove his non-compliance beyond a reasonable doubt. For these reasons as well, we conclude he cannot now raise any *Cunningham* issues. (See *Shelton, supra,* 37 Cal.4th at

p. 767; *People v. Buttram* (2003) 30 Cal.4th 773, 783; accord *People v. Vargas* (2007) 148 Cal.App.4th 644, 648.) When appellant waived his right to a jury trial in contemplation of the bargained-for plea, he thereby waived his right to a jury trial on the issue of a violation of the terms of his plea agreement.

Lastly, *Apprendi, Blakely,* and *Cunningham* all exempted recidivism and prior convictions from the category of facts that must be found by a jury in order to increase a defendant's sentence beyond the statutory maximum. (*Apprendi, supra,* 530 U.S. at pp. 488, 490; *Blakely, supra,* 542 U.S. at p. 301; *Cunningham, supra,* 549 U.S.at p. 868.) Appellant admitted in connection with his negotiated plea agreement that he had a prior strike conviction. Additionally, appellant's probation and sentencing report reveals a lengthy criminal record and that appellant been involved in criminal activities since he was declared a delinquent ward of the court. The same report reveals convictions for numerous crimes including possession of a dangerous weapon, prostitution, sale of marijuana, and voluntary manslaughter. Recidivism is an aggravating factor not requiring presentation to the jury. Under *Black II, supra,* 41 Cal.4th at p. 812, the existence of these aggravating factors, established by means that satisfy the governing Sixth Amendment authorities, "renders a defendant *eligible* for the upper term sentence" under the determinate sentencing law, so that "any additional fact finding engaged in by the trial court in selecting the appropriate sentence among the three available options does not violate the defendant's right to jury trial." Under *Black II*, once appellant's recidivism was established, he was thereby eligible for the upper term sentence; and the trial court was authorized to impose that sentence whether or not it relied on any additional factors. (*Id* at p. 815.) Accordingly, based on this rationale as well, appellant's upper term sentence did not violate his Sixth Amendment right to a jury trial. The evaluation of recidivist factors would have supported imposition of the upper term without violating *Blakely or Cunningham* because it involves objective facts provable from court records, whose ascertainment is traditionally performed by judges as part of the sentencing function. (See *Almendarez-Torres v. U. S.* (1998) 523 U.S. 224, 243-244; *People v. McGee, supra,* 38 Cal.4th at p. 709.) "Only a single aggravating factor is

required to impose the upper term . . . ." (*People v. Osband* (1996) 13 Cal.4th 622, 728.) Defendant's claim of *Blakely-Cunningham* error fails for this reason as well.

We do not find that the recent California Supreme Court case of *French* (2008) 43 Cal.4th 36 (*French*), mandates a different conclusion.[9] In *French*, the Supreme Court held that by pleading no contest pursuant to a plea agreement providing for a sentence not to exceed a stipulated maximum and further stipulating to a factual basis for the plea, the defendant neither waived his right to a jury trial on aggravating circumstances nor admitted facts that established an aggravating circumstance; therefore imposition of the upper term sentence violated defendant's Sixth Amendment right to a jury trial. The Supreme Court held that at the time the defendant entered his plea of no contest, he expressly waived his right to a jury trial on the substantive offenses, but this waiver did not encompass his right to a jury trial on any aggravating circumstances. The defendant in *French* was therefore sentenced to the high term based on aggravating circumstances identified as requiring a jury trial under *Cunningham* while his plea of no contest to the charge did not include an admission of any identified aggravating circumstances.

The critical difference between *French* and this case however, is that the imposition of the high term in this case was based upon the violation of the terms of the plea bargain; a bargain which required appellant to perform certain tasks after the plea was taken and he was released from custody. The plea bargain did not contemplate a jury trial on the issue of violation and as discussed above, a trial court making a finding of a violation of a

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[9] *French* does resolve the issue of the necessity of a certificate of probable cause. "Accordingly, 'a certificate of probable cause is not required to challenge the exercise of individualized sentencing discretion within an agreed maximum sentence. Such an agreement, by its nature, contemplates that the court will choose from among a range of permissible sentences within the maximum, and that abuses of this discretionary sentencing authority will be reviewable on appeal, as they would otherwise be. Accordingly, such appellate claims do not constitute an attack on the validity of the plea, for which a certificate is necessary.' (*People v. Buttram* [, *supra*,] 30 Cal.4th [at pp.] 790-791.)" (*French*, *supra*, 43 Cal.4th at p. 45.)

plea agreement is not making a statutory finding in aggravation or a discretionary sentencing choice. Consequently there is no "upper term choice" or increased sentence choice" as contemplated by *Blakely* and *Cunningham*.

Although the trial judge at the time of the resentencing referred primarily to appellant's absconding from sentencing, the record in this case contains evidence of available aggravating factors which the trial judge could have appropriately considered in deciding on appellant's sentence: his failure to abide by the plea bargain, his prior convictions, and his prior unsatisfactory performance on probation and parole. On this record before this court we believe the trial court would resentence appellant to the high term for the violation of the terms of the plea agreement. Because the high term sentence is available based on allowable aggravating factors, we shall avoid the wasted effort of returning the case for resentencing and affirm the judgment.

DISPOSITION

The judgment of the trial court is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

COOPER, P. J.

We concur:

RUBIN, J.

BIGELOW, J.